Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL NO 02–11 OF 2000 (W)
WAN ADNAN CJ (MALAYA), MOHAMED DZAIDDIN AND ABDUL MALEK AHMAD FCJJ
2 MAY 2002

Land Law *— Sale of land — No issue document of title or registered charge — Land assigned to lender as security for loan — Whether assignment absolute — Whether O 83 & O 31 of Rules of the High Court 1980 mandatory — Whether lender may without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there was no issue document of title and no registered charge*

The respondents entered into a sale and purchase agreement with the developer to purchase a shop unit in the Phileo Promenade, the Corporate Park in Kuala Lumpur. To finance the purchase, the respondents obtained a term loan from the appellant. The loan agreement cum assignment was entered into under which the respondents' rights, title and interest under the sale and purchase agreement were absolutely assigned to the appellant. The two respondents also executed a joint power of attorney in favour of the appellant. The individual strata title had not been issued since and although the loan was fully disbursed by the appellant, the respondents had defaulted on the monthly payments. Consequent to the default, the appellant demanded repayment of the balance of the loan amount. As there was no response from the respondents, the appellant's solicitors sent a letter terminating the respondents' licence to occupy the relevant property. At the same time, they notified the respondents on the appellant's intention to sell the property. The advertisement to sell the property indicated that a public auction would be held. One day before the scheduled public auction, the respondents filed an originating summons and obtained an ex parte injunction to restrain the holding of the public auction of the property. The order was subsequently confirmed by the High Court after hearing both parties (see [1999] 1 MLJ 89). The appeal to the Court of Appeal was dismissed (see [1999] 3 MLJ 157). Leave was granted by this court on the question of whether a lender may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is no issue document of title and no registered charge.

Held, allowing the appeal:

(1) Whether or not an agreement was an absolute one, not purporting to be by way of charge only, within the meaning of s 4(3) of the Civil Law Act 1956, was to be gathered only from the four corners of the instrument itself and the document in this case was an absolute assignment not purporting to be a charge only within the

meaning of that provision and therefore the respondents was not competent to maintain the action when it was filed (see p 519G–H); *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 followed.

(2) Although the Rules of the High Court 1980 ('the RHC') was a form of delegated legislation, its function was to regulate the machinery of litigation. The RHC therefore could not extend into an area of substantive law; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 followed. The procedural effect of O 83 of the RHC was that it would only apply if the transaction was by way of charge where there was a document of title of the property in question. This was because the rules of court did not contain any power to confer the sale of property where no power was conferred by legislation. Order 31 of the RHC was also a procedural non-mandatory provision (see pp 523F–G, 530C–D).

(3) In the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realize its security under an absolute assignment of rights to land, the court should give effect to and recognize the contractual rights as determined between the vendor and the purchaser. The court answer the question posed above in the positive (see p 530F–H).

[**Bahasa Malaysia summary**

Responden-responden telah memasuki satu perjanjian jual beli dengan pemaju untuk membeli sebuah unit kedai di Phileo Promenade, Corporate Park di Kuala Lumpur. Untuk membiayai pembelian tersebut, responden-responden telah mendapat pinjaman bertempoh daripada perayu. Perjanjian pinjaman dengan penyerahakan telah dimasuki di mana hak, hakmilik dan kepentingan responden-responden di bawah perjanjian jual beli secara mutlak diserahakkan kepada perayu. Kedua-dua responden juga telah memasuki satu surat kuasa wakil bersesama yang memihak kepada perayu. Hakmilik strata yang berasingan tidak dikeluarkan sejak itu dan walaupun pinjaman telah dibayar sepenuhnya oleh perayu, responden-responden telah gagal membuat bayaran bulanan. Berikutan kegagalan tersebut, perayu telah menuntut bayaran balik baki jumlah pinjaman tersebut. Memandangkan tiada jawapan daripada responden-responden, peguamcara perayu telah menghantar sepucuk surat menamatkan lesen responden-responden untuk menduduki hartanah tersebut. Pada masa yang sama, mereka telah memaklumkan responden-responden tentang niat perayu untuk menjual hartanah tersebut. Iklan untuk menjual hartanah tersebut menunjukkan bahawa satu lelongan awam akan diadakan. Sehari sebelum lelongan awam tersebut dijadualkan, responden-responden telah memfailkan satu injunksi ex parte untuk menyekat daripada diadakan lelongan awam ke atas hartanah tersebut. Perintah telah

selanjutnya disahkan oleh Mahkamah Tinggi setelah mendengar kedua-dua pihak tersebut (lihat [1999] 1 MLJ 89). Rayuan ke Mahkamah Rayuan telah ditolak (lihat [1999] 3 MLJ 157). Kebenaran telah diberikan oleh mahkamah ini terhadap persoalan tentang sama ada seorang yang memberikan pinjaman boleh, tanpa mendapatkan satu perintah jualan daripada mahkamah, merealisasikan jaminan beliau yang terdiri daripada hartanah yang tak boleh dialih di mana tidak terdapat dokumen hakmilik keluaran dan tiada gadaian berdaftar.

Diputuskan, membenarkan rayuan tersebut:

(1) Sama ada atau tidak satu perjanjian adalah mutlak, yang bukan bagi tujuan melalui gadaian sahaja, maksud s 4(3) Akta Undang-Undang Sivil 1956, hanya dapat diperolehi daripada empat penjuru instrumen tersebut sahaja dan dokumen dalam kes ini adalah satu penyerahakan yang mutlak bukan untuk tujuan menjadi satu gadaian sahaja dalam maksud peruntukan tersebut dan oleh itu responden tidak kompeten untuk mengekalkan tindakan apabila ia difailkan (lihat ms 519G–H); *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 diikut.

(2) Walaupun Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') adalah satu bentuk perundangan yang diwakilkan, fungsinya adalah untuk mengawal jentera litigasi. KMT oleh demikian tidak boleh diperluaskan kepada bidang undang-undang substantif; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 diikut. Kesan prosedur A 83 KMT adalah ia akan hanya terpakai jika transaksi adalah melalui gadaian di mana satu dokumen hakmilik hartanah dipersoalkan. Ini adalah kerana kaedah-kaedah mahkamah tidak mengandungi apa-apa kuasa yang diberikan untuk jualan hartanah jika tiada kuasa sedemikian telah diberikan oleh perundangan. Aturan 31 KMT juga satu prosedur peruntukan yang tidak mandatori (lihat ms 523F–G, 530C–D).

(3) Dengan ketiadaan apa-apa peruntukan statutori atau common law yang menghendaki pemegang gadai janji ekuiti untuk mendapatkan satu perintah mahkamah untuk merealisasikan jaminannya di bawah satu serahak mutlak ke atas hak-hak tanah tersebut, mahkamah sepatutnya menguatkuasakan dan mengakui hak-hak kontraktual sebagai mana yang telah ditetapkan antara penjual dan pembeli. Mahkamah menjawab persoalan tersebut yang diutarakan di atas secara positif (lihat ms 530F–H).]

Notes

For cases on sale of land generally, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3341–3866.

Cases referred to

Arab-Malaysian Credit Bhd v Tan Seang Meng [1995] 1 MLJ 525 (refd)
Chuah Eng Khong v Malayan Banking Bhd [1998] 3 MLJ 97 (refd)
Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd [1988] 2 MLJ 62 (refd)
Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149 (refd)
Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (refd)
Lee Lee Cheng (f) v Seow Peng Kwang [1960] MLJ 1 (refd)
Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd [1984] 2 MLJ 143 (refd)
PhileoAllied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [1999] 3 MLJ 157 (refd)
Malayan Banking Bhd v Zahari bin Ahmad [1988] 2 MLJ 135 (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (folld)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd [1997] 2 MLJ 590 (refd)
Robinson, Re ; Pickard v Wheater (1886) 31 Ch D 247 (refd)
Swiss Bank Corporation v Lloyds Bank Ltd & Ors [1982] AC 584 (refd)
Wicks v Wicks [1998] 1 All ER 977 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Courts of Judicature Act 1964 ss 17(1), 78, item 3 of Schedule
Exchange Control Act 1947 [Eng]
National Land Code 1965 s 256
Rules of the High Court 1980 O 31 r 1, O 83, O 92 r 4
Specific Relief Act 1950 s 41

Appeal from: Civil Appeal No W–02–736 of 1998 (Court of Appeal, Kuala Lumpur)

Porres Royan (*Yoong Sin Min* and *Karen De Alwis* with him) (*Shook Lin & Bok*) for the appellant.

SG Lingam (*Dhararaj Vasudevan* and *Eric Clement* with him) (*V Pury & Bala*) for the respondents.

Abdul Malek Ahmad FCJ (delivering judgment of the court): The facts are not exactly in dispute. The respondents entered into a sale and purchase agreement with the developer on 12 November 1994 to purchase shop unit

No D–7/08, 8th Floor, Block D, measuring 1,497 sq ft in Phileo Promenade, the Corporate Park in Kuala Lumpur, at RM449,100. To finance the purchase, the respondents obtained a term loan of RM359,000 from the appellant.

The loan agreement cum assignment was entered into on 3 January 1996, under which the respondents' rights, title and interest under the sale and purchase agreement were absolutely assigned to the appellant. On the same date, the two respondents executed a joint power of attorney in favour of the appellant which was registered in the High Court on 15 January 1996.

The individual strata title has not been issued since and although the loan was fully disbursed by the appellant, the respondents had defaulted on the monthly payments. Consequent to the default, the appellant demanded repayment of the balance of the loan amount on 11 November 1997.

As there was no response from the respondents, the appellant's solicitors sent a letter dated 31 December 1997 terminating the respondents' licence to occupy the relevant property. At the same time, they notified the respondents on the appellant's intention to sell the property. The advertisement to sell the property indicated that the public auction would be held on 9 April 1998.

One day before the scheduled public auction, the respondents filed an originating summons and obtained an ex parte injunction to restrain the holding of the said public auction of the property. The order was subsequently confirmed by the High Court on 14 October 1998 after hearing both parties. The appeal to the Court of Appeal was dismissed on 7 April 1999.

Leave was granted by this court on 8 May 2000 on the following question: whether a lender may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is no issue document of title and no registered charge.

Three clauses in the loan agreement cum assignment stand out for consideration. The first is cl 8 which reads as follows:

> 8 Assignment
>
> For the consideration aforesaid, the borrower hereby absolutely assigns to the bank the full and entire borrower's benefits, rights, title and interest in and to and under the sale agreement and in the said property together with the borrower's right of enforcement thereof or thereunder, PROVIDED ALWAYS that notwithstanding the assignment hereinbefore contained or any other provision of this assignment, the borrower shall and hereby undertakes to continue to observe, perform and be bound by all, whatsoever conditions, covenants and stipulations therein on the part of the borrower expressed and contained in the sale agreement.

The second is cl 23.4 which reads:

23 Powers on default

The bank may at any time after an event of default or in making demand be entitled to exercise all or any of the rights and powers following —

23.1 …

23.2 …

23.3 …

23.4 the right and power to sell and assign the said property as the absolute unencumbered owner thereof at such price or prices and in such manner as the bank shall in its absolute discretion think fit free from any interest of the borrower hereunder or otherwise, and to apply the proceeds of sale in or towards the satisfaction of the amount hereby secured and all the principal and interest and other monies due to the bank hereunder, the payment to the relevant authorities of all quit rent, assessment, drainage, rates and other outgoings payable in respect of the said property, the payment to the developer or the management corporation constituted under the Strata Titles Act 1985/the Land Ordinance (Sabah Cap 68) and the Land (Subsidiary Title) Enactment 1972 (Sabah), the Land Code of Sarawak and the Strata Titles Ordinance 1972 (Sarawak), as the case may be, of all service charges and maintenance fees payable in respect of the said property, and all costs, expenses, dues and fees, including the bank's solicitor's costs on a solicitor and client basis and fees of the valuer real estate agent, if any, and the residue, if any, only shall be payable to the borrower, and no assignee or purchaser from the bank shall be concerned to ascertain whether or not any such default has actually arisen so as to entitle the bank to exercise its powers of sale and assignment.

And the borrower shall hereby expressly agree, covenant and undertake to do and execute all acts, deeds, instruments and things which the bank may require or stipulate for the purpose of effecting and/or completing anything and/or any transaction mentioned in this clause.

The third is cl 26 which is reproduced below:

26 Issue of separate document of title

Upon the issue of a separate issue document of title/strata title, as the case may be, to the said property, the borrower shall at its own cost and expense and upon being so required to do by notice in writing from the bank, take a transfer of the said property from the bank, if the same shall have been transferred to the bank as assignee under the sale agreement or if the bank so deems fit as its absolute discretion, directly from the developer, as the case may be, and shall execute and deliver to the bank a charge under the National Land Code 1965 or the Land Ordinance (Sabah Cap 68) or the Land Code of Sarawak, as the case may be, in such form and containing such terms and conditions as may be prescribed by the bank over the said property in favour of the bank to secure the repayment to the bank of the banking facilities and all other monies together with interest thereon at the relevant prescribed rate payable and owing by the borrower by virtue of this assignment at the

> date of the execution of the said charge and notwithstanding the completion and perfection of the said charge, this assignment shall as regards any antecedent default by the borrower remain in full force and effect.

Clause 8 thus makes it clear that upon its true construction, this is an absolute assignment under s 4(3) of the Civil Law Act 1956 ('the CLA') which states:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim, the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

In *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268, the appellant had purchased from the developer a shop office unit in a multi-storey shopping and office complex to be erected on land in Johor Bahru for the sum RM184,320. Subsequently, the appellant entered into an agreement with Public Bank which agreed to give the appellant a fixed loan of RM92,160. The appellant also executed an assignment to the bank of all his rights, title and interest in the property pending the issue of the strata title. Subsequently, the respondent purchased from the developer the whole shopping and office complex, excluding the units already sold by the developer. The appellant commenced proceedings against the respondent for certain declaratory relief. After the filing of the originating summons, the assignment was revoked following the repayment and settlement of the fixed loan. A preliminary objection was taken by the respondent that the action could not be maintained in the name of the appellant as assignor. The learned judicial commissioner upheld the objection and struck out the proceedings. The appellant appealed.

It was held by the Federal Court (Wan Suleiman, Seah and Mohamed Azmi FCJJ) that whether or not an agreement is an absolute one, not purporting to be by way of charge only, within the meaning of s 4(3) of the CLA, is to be gathered only from the four corners of the instrument itself, and the document in this case was an absolute assignment not purporting to be a charge only within the meaning of that provision, and therefore, the appellant was not competent to maintain the action when it was filed.

The relevant passage of the judgment delivered by Seah FCJ is as follows at p 270:

> It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that

the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s 25 and the action must be brought in the name of the assignee (Mathew LJ in *Hughes v Pump House Hotel Co Ltd* [1902] 2 KB 190). Having stated the preliminary and before we examine the terms of the document of assignment dated 18 February 1978 we would dispose of a short submission of learned counsel for the appellant. It was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with the said loan agreement. With respect, we do not agree. In our judgment and it seems clear from the authorities above- mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.

Since the respondents in the instant appeal were in the same position as the appellant in *Nouvau Mont Dor*, it is our view and it follows that the respondents are not competent to maintain the originating summons.

But the learned trial judge in the appeal before us, while maintaining that this was a case of an absolute assignment, was of the considered opinion that an assignee must obtain an order for sale from the court for the purpose of recovering monies due to it from a borrower.

He relied on *Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62 where the plaintiff, a licensed bank, entered into a loan agreement with the defendant, an incorporated company, whereby the plaintiff granted a loan to the defendant, repayable with interest. By way of security for the loan, the defendant executed a deed of assignment whereby it assigned absolutely to the plaintiff all its rights, title and interest in certain immovable property and in the sale and purchase agreement. It was further provided in the loan agreement that the defendant would remain in possession of the property only as contractual licensee of the plaintiff and that within seven days after its licence to occupy the property has been terminated, it would have to give immediate vacant possession thereof to the plaintiff, and thereafter the plaintiff would have the right to enter upon the property and to deal with all its rights, title and interest in the property. The defendant defaulted in making payments due under the loan agreement, in consequence whereof, the plaintiff, after notification to the defendant, commenced the proceedings herein by way of originating summons praying for an order for sale of the property.

In that case, it was held by the High Court (Edgar Joseph Jr J) that the security concerned, being a security relating to a chose in action, that is to say, an assignment of the defendant's rights, benefits and interest in and under the sale agreement of the property, to wit, a parcel of a subdivided building, in respect of which strata title has yet to be issued, this court has jurisdiction under s 41 of the Specific Relief Act 1950 ('the SRA'), and it has inherent jurisdiction to grant the declaration prayed for by the plaintiff and an order for sale of the property. If the security herein is not a security

relating to a chose in action, but a security relating to land, then the court would hold that it has jurisdiction under O 31 r 1 of the Rules of the High Court 1980 ('the RHC') to make an order for sale of the property.

On appeal, in *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149, it was held by the Supreme Court (Abdul Hamid LP, Mohamed Azmi and Gunn Chit Tuan SCJJ) that the deed in this case was an absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the CLA. The deed clearly purports, and is intended in point of form, to be an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that the deed should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. A document given by way of charge is not one which absolutely transfers the property.

It is apparent that the High Court in *Chung Khiaw Bank* was of the view that there was jurisdiction to make an order for sale under s 41 of the SRA or under the court's inherent jurisdiction. In the case of land being the security, it could also be made under O 31 r 1 of the RHC. This point, unfortunately, was not pursued in the ensuing *Hipparion* appeal.

In the related case of *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* [1997] 2 MLJ 590, where the guarantor was sued because the sale of the property failed to produce sufficient proceeds to satisfy the bank's claim, the Court of Appeal (Gopal Sri Ram, Siti Norma Yaakob and Ahmad Fairuz JJCA) held as follows at p 591:

> (1) The argument that the deed of assignment was absolute and therefore satisfied the loan in full upon its execution overlooked the fact that the point under discussion, namely whether the deed was absolute or by way of charge only, arose in the earlier proceedings between the respondent and *Hipparion* in a procedural context. It was never *Hipparion*'s case in the earlier proceedings that its debt had been extinguished upon the execution of the deed in question. Therefore, as a matter of principle, the finding by the courts at all levels in the *Hipparion* proceedings that the deed of assignment was absolute and not by way of charge only was made in the context of the procedure adopted by the instant respondent to effect a sale of the subject property. The decision of the Supreme Court in the *Hipparion* proceedings did not facilitate the argument that the debt owed by *Hipparion* had been extinguished by the absolute assignment it gave the respondent.
>
> Further, as a matter of policy, countenancing the appellant's argument would have the effect of frustrating the recovery of loans in all cases where a financial institution takes an absolute assignment because there is unavailable a title capable of being subject to a registered charge. The construction and sale of multi storeyed residential and commercial premises would grind to a halt because no financier will ever lend money if the law were to declare all sums due under a loan agreement irrecoverable because a deed of assignment absolute of particular premises has the effect of extinguishing the debt. The court was unable to countenance a proposition that would produce so radical an effect (see pp 595I and 596A–E).

(2) The second reason for rejecting the appellant's argument was to be found in the doctrine of estoppel. An estoppel, whether procedural or substantive, must be mutual. The appellant was not a party to the *Hipparion* proceedings. Neither was he, as a director of *Hipparion*, its representative in interest. Therefore, he was a stranger to the *Hipparion* proceedings. The determination of the issues in those proceedings did not in any way affect his rights. The proceedings taken against him to enforce the guarantee were separate and distinct from the *Hipparion* proceedings. Accordingly, there was no mutuality between the parties or interest. Absent mutuality, the appellant's argument could not stand. Hence, there was no injustice done to him if the respondent went behind the four corners of the deed of assignment to show the true purpose of its creation (see pp 596F, I and 597A–B, F); *Low Lee Lian v Ban Hin Lee Bank* [1997] 1 MLJ 77 followed.

Despite stating that, the position in Malaysia was different from that in England, in view of the existence of O 92 r 4 of the RHC here and the absence of a similar provision there, which expressly declares the inherent powers of the High Court, and having cited *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] MLJ 1, *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 and *Arab-Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525 in support, the Court of Appeal, per Gopal Sri Ram JCA in the instant appeal had this to say on this point (see *PhileoAllied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [1999] 3 MLJ 157 at pp 170–171:

> In my judgment these decisions are not authority for the proposition that it is mandatory for a lender who secures the loan by means of a deed of assignment over immovable property that is without an issue document of title to move the court under RHC O 31 r 1(1) and obtain an order for sale for the purpose of enforcing his security. They are merely authority for the proposition that if the lender does make such an application, then the court is seized of jurisdiction to grant him an order for sale.
>
> For these reasons I find myself unable to agree with the first ground advanced by the learned judge for granting the respondents the relief they claimed. The conclusion I have arrived at renders it unnecessary for me to address the other arguments advanced by Mr Royan on the first ground. But this much I will say: that I do not agree with his submission that the appellant is in a like position to a mortgagee at common law.

It was the thrust of learned counsel for the appellant's submission that a person in the appellant's position does not need to seek recourse to O 83 of the RHC to sell the property. In distinguishing the facts in *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805, where it was held by the Supreme Court that no power of sale could be conferred by a chargor under the National Land Code 1965 ('the NLC') on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the procedure laid down in the NLC, here, the argument is that there is no charge in the first place.

Learned counsel relied heavily on the principles laid down in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, where, in dealing with O 53 of the RHC in that appeal, the Federal Court considered the status of the RHC made pursuant to s 17(1) of the Courts of Judicature Act 1964 ('the CJA') as rules made for the purpose of regulating and prescribing the practice and procedure.

On this point, it is appropriate to mention that the relevant passage in *Pacific Centre*, which was decided 13 years earlier, states at p 148:

> I might add, in passing, that I do not consider that there is any substance in the submission that O 92 r 4 of the Rules of the High Court is purely a rule of practice. The Rules of the High Court 1980 ('the RHC') was enacted in exercise of the powers conferred by s 70 (sic) of the Courts of Judicature Act 1964, with the consent of the Chief Justices of Malaya and Borneo and the Rules Committee and are comprised in PU (A) 50 which is clearly subsidiary legislation within the meaning of s 3 of the Interpretation Acts 1948 and 1967. The RHC in my opinion, therefore, have statutory force and are not mere rules of practice. In the result, I hold that there is jurisdiction by virtue of inherent powers to grant *Mareva* injunctions in this country.

In essence, the passage taken from the majority judgment of *Rama Chandran* sums it all as follows at p 222:

> The *most decisive limitation* placed on the powers of the rules committee, and indeed on other rule-making authorities, is that they extend to regulating the 'practice and procedure' of the High Court and other courts for which the rules are made. Although these powers are wide, yet it cannot be gainsaid, that they do not extend into the area of substantive law. Clearly, there is a *vital distinction* made between, on the one hand, *substantive law*, the function of which is to define, create, confer or impose legal rights and duties, and on the other hand, procedural law, the function of which is to provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognized by courts of law or any other tribunal seized with jurisdiction to adjudicate on a dispute before it. (Emphasis added.)

Other excerpts in that judgment emphasize the fact that although the RHC is a form of delegated legislation, its function is to regulate the machinery of litigation. Further, the RHC cannot therefore extend into the area of substantive law and the powers of the court in judicial review proceedings fall within the area of substantive law.

As for the aspect of the court's inherent jurisdiction, the majority judgment states further at pp 238–239:

> In my view, O 92 r 4 is a unique rule of court for while it neither defines nor gives jurisdiction, yet it serves as a *reminder* and *confirmation* — lest we forget — of the common law powers of the court, which are residuary or reserve powers and a separate and distinct source of jurisdiction from the statutory powers of the court.
>
> In other words, even without O 92 r 4, the inherent powers of High Court would still be there. In the United Kingdom, for instance, there is no provision in the Supreme Court Rules, equivalent to our O 92 r 4, yet the inherent powers occupy a position of great importance in the High

Court there as the article by Sir Jack Jacob amply demonstrates. And, the Court of Appeal there also exercises an inherent jurisdiction (see *Aviagents v Balstravest Investment Ltd* [1966] 1 WLR 150) notwithstanding the absence of any provision in any written law or rule of court providing for inherent powers.

It was the contention of learned counsel for the appellant that although a loan agreement cum assignment was not an equitable charge but an equitable mortgage, that was not the point as O 83 of the RHC was not applicable. This was because the RHC does not contain any power to confer the sale of property where no power is conferred by legislation. He argued that O 83 of the RHC was only the mechanics for such a sale where there is in existence a registered charge.

Learned counsel for the respondents argued that the assignment here is an equitable mortgage or charge, as a binding undertaking to confer an interest that is specifically enforceable will confer a proprietary interest in the subject matter in equity. Whether a particular transaction gives rise to an equitable charge must depend upon the intention, expressed or conferred, of the parties ascertained from what they have done in the circumstances.

In *Swiss Bank Corporation v Lloyds Bank Ltd & Ors* [1982] AC 584, the plaintiff agreed to lend a sum in Swiss Francs to the third defendant to enable them to acquire shares and loan stocks of FIBI, a new Israeli bank. Under the loan agreement, the third defendant covenanted to observe all the conditions attached to the Bank of England's consent which had been obtained for the loan under the Exchange Control Act 1947 ('ECA'), namely that on acquisition, the FIBI securities should be held in a separate account, that repayment of the loan was to be made from the sale proceeds of the FIBI securities and that the scrip of the FIBI securities was to be held by an authorized depositary. The FIBI securities invested were deposited with the fourth defendant which was also an authorized depositary.

The following year, the third defendant granted an equitable charge over the FIBI securities to the first defendant, also an authorized depositary, without specific permission from the Bank of England. The High Court held that the loan agreement constituted an equitable charge over the FIBI securities in favour of the plaintiff, and that the charge to the first defendant was illegal and void for failure to comply with the ECA, and also because no consent was obtained from the Bank of England.

The Court of Appeal allowed the appeal, and the House of Lords, in dismissing the appeal, held that there was nothing in the documents to suggest that there was any agreement with the plaintiff on the part of the third defendant to repay the loan out of the FIBI securities, and the plaintiff's claim to any charge over or proprietary interest in the FIBI securities or the proceeds of their sale failed. Further, the granting of an equitable charge over a foreign currency security through a transfer did not involve a change of beneficial ownership.

Learned counsel for the respondents also cited the case of *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97, where the appellant

borrower entered into a loan agreement with the respondent lender whereby the borrower borrowed RM60,000 for the payment of the purchase price of some land, and agreed to pay interest thereon. In consideration thereof, the borrower assigned unto the lender all his rights, title and interest in the land by way of security for the loan. The borrower defaulted in the payment of interest and instalments and the lender filed an action in the sessions court, stating that by virtue of the default, the whole of the sum lent together with interest thereon became wholly due and payable.

The lender contended that it was entitled to keep and hold on to the document of title because a mortgagee was entitled to retain the security or the document of title until the contractual interest stipulated by the mortgage had been paid. The Court of Appeal found that under the loan agreement, the covenant to pay interest was an independent covenant. The borrower appealed on the ground that the loan agreement was not a charge or mortgage, and that the covenant on the contractual rate of interest had merged in the final judgment of the sessions court.

In allowing the appeal and dismissing the cross appeal, this court (Chong Siew Fai CJ (Sabah & Sarawak), Peh Swee Chin and Mohamed Dzaiddin FCJJ) said at pp 108–109:

> At common law and under the relevant rules of equity, the said loan agreement would amount to an equitable mortgage because the assignment of the right, title and interest in the said land was expressly or obviously for the purpose of securing the loan given to the borrower to purchase the said land. The said loan agreement is not an out and out purchase of the said land. This view is reinforced by the promise that when the document of title of the said land was available after the completion of the subdivision aforesaid, the borrower would execute a charge in favour of the lender according to the provisions of the National Land Code 1965 ('the NLC'). It is true that nowhere in the said loan agreement has the word 'mortgage' been used, but it is a security transaction in connection with the loan given by the lender with a provision for repayment, after which, the borrower 'shall be entitled … to obtain a discharge and release of the said lot from the lender' (see cl 27 of the said loan agreement). Thus, we have the loan, the contractual right to repay or to redeem the said land and the assignment of all 'right, title and interest' in the said land pending the exercise of such contractual right to redeem. The said loan agreement, therefore, at common law, will be a mortgage. It would be an equitable mortgage (and not a legal mortgage) because the borrower at the time of signing the said loan agreement had no legal estate (or registered proprietorship of a grant of land) but only an equitable interest as a purchaser by contract from a housing developer, pending the issuance of a separate document of title aforesaid. In other words, it is a mortgage in equity for which the actual form of words is immaterial, provided the meaning is plain when interpreting a document as a mortgage or equitable mortgage; see *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at p 462.
>
> If it is an equitable mortgage, like a legal mortgage, the borrower has obtained a second right to redeem after the contractual date for redemption has expired, ie he has got the equity of redemption for, in the eyes of equity, the lender is not the owner of the said land withstanding the said assignment,

but the borrower is, but subject to the mortgage, and the lender is a mere 'incumbrancer'. The equity of redemption arises as soon as any document, on a true construction, is found to be a mortgage. The use of the word 'mortgage' may sound like sacrilege in view of the presence of the NLC which does not use the word, especially to a legal man who specializes in 'common law' but not to one who is familiar with 'chancery practice', for to the latter, despite the assignment, the borrower is still the owner of the said land subject to the mortgage. The matter, of course, should not rest here. Further investigation into the legal position of a mortgage in this country is required.

In a later part of the judgment, this court stated at pp 111–112:

Although there is a well-known distinction between a mortgage where a borrower's land is usually transferred or assigned subject to the equity of redemption and a charge where such land is not transferred or assigned at all but it gives the chargee rights over the land, a charge of land has always been regarded as a species of mortgage for most practical purposes; see *Law of Real property* by Sir Robert Megarry (former Vice Chancellor of Supreme Court of the United Kingdom) and HSR Wade (5th Ed) at p 94.

The Court of Appeal used the words 'equitable mortgage' in relation to the security transaction without restraint and totally without any inhibition in the face of the National Land Code. We support such usage.

Here, the said loan agreement, on a true construction, is an equitable mortgage but not an equitable charge, as there was no deposit of document of title with the lender, as in Arunasalam Chetty, for when the said loan agreement was signed there was no actual and single document of title over the said land at the time of the signing of the said loan agreement.

The Federal Court in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 approved Arunasalam Chetty and held that an equitable charge had arisen when a sum, claimed by the plaintiffs, was paid as deposit for the purchase of some land in which the plaintiffs and the defendant (recipient of the sum) were engaged in a joint venture.

Suffian LP in *United Malayan Banking Corp Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169 held that the possession of the land title 'gives them an equitable interest in lands …'. In the fairly recent case of *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135, Mohamed Dzaiddin J applied principles of equity in holding the transaction before him to be an equitable charge.

The well-known case of *Hj Abdul Rahman & Anor v Mahomed Hassan* [1917] AC 209 concerned an agreement dealing with land in Selangor in which a debtor transferred his land in Selangor to his creditor as security for a debt with a condition that if the debtor repaid him within six months thereafter, the land would be re-transferred to the debtor. Selangor's registration of Titles Regulations 1891 was then in force. By s 41 of the said regulations, it was provided that whenever any land intended to be made security in favour of any other person, the proprietor would have to execute a charge in the form provided. Further, s 4 of the said regulations expressly provided that land could only be dealt with in accordance with the said regulations and that every attempt to transfer, transmit, mortgage, charge or otherwise deal with the same except in accordance with the provisions of the said regulations 'shall be null and void and of no effect …'. The Privy Council was in my opinion driven by s 4 to hold that the agreement conferred

'no real right in the land' and compare the dictum of Terrell Ag CJ set out above.

Subsequent Land Code and the present NLC have not contained or have deliberately left out any provisions similar to s 4 of the said 1891 regulations. The decision of *Hj Abdul Rahman* in reftising to uphold the agreement there on account of the said s 4 should not be used as an authority to negative or invalidate any equitable mortgage or equitable charge created by contracts outside any enactments of the Torrens system's registration of titles such as the NLC.

The three judges in *Arunasalam Chetty* had used the expression 'equitable mortgage' to the transaction of loan of money secured by a deposit of title, a fortiori, the said loan agreement should be called an equitable mortgage on the facts. Thus, s 21(1) of the Limitation Act 1953 provides 12 years in the case of mortgage of land. The word (of) (sic) 'mortgage' is used. Effect should be given to the intention of parliament.

It must be highlighted here that despite the extensive overview in the said judgment on the subject of charges and mortgages, there was actually no specific reference to O 83 of the RHC.

In *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135, the defendant owed the plaintiff a certain amount of money. Pursuant to the loan, a loan agreement and a deed of assignment was executed on 16 March 1974. The defendant defaulted on the repayment of the loan. The plaintiff applied to the court for an order, inter alia, that they be at liberty to issue a writ of possession in respect of the charged property and for an order that they be at liberty to sell. In addition, they wanted the proceeds of sale to be paid to them in satisfaction of the principal sum and interest due and owing to them. The plaintiff's application was made under O 83 of the RHC.

The learned trial judge held at p 136:

Looking at the loan agreement and the deed of assignment in the present application, in my opinion these documents create an equitable charge both in form and substance. As O 83 applies to a charge action, I make an order in terms of the plaintiff's application …

In my opinion, an application such as the present one for an order of possession and for sale of property should be made under O 83 and not under O 31 because by its nature and substance O 83 provides for an application for sale by an equitable chargee. In the present case, the bank is an equitable chargee, as there is no issue document of title having been issued in respect of the said property.

Learned counsel for the respondents further submitted that from the line of authorities, the court has the power to make a declaration in cases of this nature by virtue of s 41 of the SRA which provides:

Discretion of court as to declaration of status or right

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a

declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief: A

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

It is obvious that this provision remains, at best, merely permissive. B

The line of argument of learned counsel for the appellant was that at common law, a mortgagee under either a legal or equitable mortgage has the power to sell and convey the legal estate to a third party upon the default of payment by the mortgagor pursuant to the express terms of the mortgage deed without an order of court.

C

Consequently, he submitted that the Court of Appeal was in error in relying on *Chuah Eng Khong* and concluding that the loan agreement cum assignment amounts to an equitable charge. This was because *Chuah Eng Khong* had clearly decided that a loan agreement cum assignment amounts to an equitable mortgage of land and was not an equitable charge of land. D

Learned counsel advanced the following reasons as to why the Court of Appeal was in error:

(a) in a situation of a legal or equitable mortgage, if the mortgage deed confers upon the mortgagee the express powers to sell and convey the rights to the legal estate, the mortgagee can effectively rely on such provisions without the need to obtain an order of court; E

(b) Order 83 of the RHC does not apply to mortgage actions;

(c) Order 83 of the RHC is merely a procedural provision. The function of the rules is to regulate and govern procedure, which can only be used in support of or in connection with relevant substantive law; F

(d) Order 83 of the RHC cannot be independently relied upon to compel the appellant, the equitable mortgagee, to make an application to the court for an order for sale of the said property in the absence of any express or implied provision in the NLC or any common law imposing such an obligation on the appellant; G

(e) in respect of charges over land with a document of title, s 256 of the NLC expressly compels a chargee to make an application to the court for an order for sale if the chargee wishes to realize such security. The procedure governing such application would then be as provided by O 83 of the RHC; H

(f) however, in respect of an equitable mortgagee in connection with land which has no document of title, the NLC is silent. Order 83 of the RHC cannot therefore be used as a substantive law to compel an equitable mortgagee to obtain a court order to sell the said land if he wishes to realize his security;

(g) the Court of Appeal, with respect, had erred in distinguishing *Wicks v Wicks* [1998] 1 All ER 977 on the basis that in the English Rules of the Supreme Court ('the English Rules'), there is no corresponding I

provision of O 92 r 4 as found in our RHC which expressly declares the inherent powers of the High Court;

(h) it is submitted that the Court of Appeal had failed to consider the decision of *R Rama Chandran* where the Federal Court stated that even without O 92 r 4 in the English Rules, the inherent powers of the court would still be there;

(i) although the English Court of Appeal has the inherent jurisdiction, the English Court of Appeal in *Wicks v Wicks* still declined to exercise their inherent powers and held that O 31 of the English Rules is not a source of jurisdiction but merely a procedural provision;

(j) the inherent powers of the court under O 92 r 4 of the RHC also cannot be relied on to confer an original source of jurisdiction to the rules of court when none exists in the first place;

(k) in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realize its security under an absolute assignment of rights to land, the court should give effect to and recognize the contractual rights as determined between the vendor and the purchaser.

In *The Law of Real Property* (5th Ed) by Sir Robert Megarry and HWR Wade at p 914, the authors state that for most practical purposes a charge should be regarded as a species of mortgage, and it is so dealt with. Nevertheless, there is an essential difference between a mortgage and a charge. A mortgage is a conveyance of property subject to a right of redemption, whereas a charge conveys nothing and merely gives the chargee certain rights over the property as security for the loan.

At p 924 of the same text, it is stated that a charge by deed expressed to be by way of legal mortgage gives the mortgagee, whether first or subsequent, the same rights and remedies as if he had a subterm one day shorter than the term vested in the mortgagor. As in the case of freeholds, he gets no actual term of years but is as fully protected as if he had one.

Then, at p 926, the paragraph on methods of creating equitable mortgages and charges, says that the fundamental difference between a mortgage and a charge is that a mortgage is a conveyance of property, legal or equitable, subject to a right of redemption, whereas a charge conveys nothing but merely gives the chargee certain rights over the property charged. Only mortgages could be created at common law; but in equity both mortgages and charges were possible. Equitable charges are still occasionally created, but the remedies of an equitable chargee are inferior to those of a mortgagee.

In *Cheshire and Burn's Modern Law of Real Property* (15th Ed) by EH Burn, the paragraphs on deposit of title deeds at pp 669–670 states as follows:

> It has been held, since the case of *Russel v Russel* (1783) 1 Bro CC 269 in 1783, that an equitable mortgage is created by the delivery to the lender of the title deeds relating to the borrower's land, provided that it is intended to treat the land as security.

> In this particular case there need be no memorandum, since the deposit ranks as an act of part performance before 27 September 1989, and the deposit alone is treated as constituting a contract to execute a legal mortgage. An actual deposit, though essential, is not in itself sufficient. The depositee must go further, and prove by parol or by written evidence that the deposit was intended to be by way of security, for the mere deposit by a customer of his deeds with a bank will not, for instance, constitute the bank an equitable mortgagee in respect of an overdraft.
>
> In practice, however, the borrower usually signs a memorandum executed as a deed contemporaneously with the delivery of the deeds, for such a memorandum makes the transaction a mortgage by deed within the meaning of the Law of Property Act 1925, and entitles the equitable mortgagee to exercise all the powers, including the power of sale, given by the Act. But since an equitable mortgagee cannot convey the legal estate to a purchaser, it is usual to insert a power of attorney or a declaration of trust, or both, in the memorandum, so as to enable the mortgagee to deal with the legal estate.

We were of the view that the procedural effect of O 83 of the RHC was that it would only apply if the transaction was by way of charge where there was a document of title of the property in question. Order 31 of the RHC is also, in our view, a procedural non-mandatory provision to be resorted to in certain circumstances which are not relevant to the question posed.

As stated in the *Malaysian High Court Practice (1998 Desk Edition)* Vol 1 at p 2227, O 31 of the RHC applies to any action or proceeding which relates to land and in which it is necessary or expedient to have such land or any part thereof sold. The power to order such sale is conferred by item 3 of the Schedule to the CJA. It cannot apply to charge actions which fall under O 83 of the RHC and to foreclosure proceedings where the land is charged under the NLC. The court may only order a sale whenever it is necessary for the purposes of the action but it is not intended to enable the court to sell real estate when otherwise it has no power to do so (see *Re Robinson, Pickard v Wheater* (1886) 31 Ch D 247 at p 249).

All things considered, we were more inclined to agree with learned counsel for the appellant, in particular with his submission that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realize its security under an absolute assignment of rights to land, the court should give effect to and recognize the contractual rights as determined between the vendor and the purchaser.

We would, therefore, answer the question in the positive. The appeal is allowed with costs here and in both the courts below. The deposit is refunded to the appellant.

In line with s 78 of the CJA, we would like to place on record that in the course of writing this judgment, the presiding judge, who was at the time of hearing this appeal the Chief Judge of the High Court in Malaya, but who at the time of his demise was the President of the Court of Appeal, passed away on 24 December 2001. My learned brother Mohamed Dzaiddin FCJ,

who has since assumed the post of Chief Justice, has read this judgment in draft with which he has expressed his agreement.

Appeal allowed.

Reported by Peter Ling